his issue living at his death or born within ten months thereafter." Whether this was intended as equivalent to a remainder "to the whole line of the issue of S" (or to the "general issue" of S), the opinion does not state. Whether it was or not could make no possible difference after the abolition of the rule in *Shelley's Case*, since it would operate as a contingent remainder in either case, and identically the same parties would take as remaindermen.

It would seem, therefore, to be fair to presume that the court did not attempt to define with absolute precision the technical language in which the implied remainder should be couched.

It might be added, upon the authority of *Smith* v. *Chapman*, 1 H. & M. 298, Judge Roane's opinion, that since the ultimate remainder in this case was for the *life* of the remaindermen only, an intention was thereby shown to restrict the word "issue" to children of the first degree only. But this point is not mentioned in the decision.

Thus it will be seen that out of the three Virginia cases, one decides nothing; of the two remaining, one leans each way. The counsel who may hereafter have to uphold either view need surely not despair.

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A QUESTION UNDER THE BANKRUPT ACT.

MAY ONE WHO HAS MADE A GENERAL DEED OF ASSIGNMENT BE ADJUDGED A BANKRUPT WHERE HE IS SOLVENT AT THE TIME OF FILING THE PETITION?

In the construction of the recent Bankrupt Act passed by Congress and approved July 1, 1898, many interesting points will be raised by the alleged bankrupt and the petitioning creditors. In *Lea* v. *West*, 4 Va. Law Reg. 662, Judge Waddill held that a general deed of assignment for the benefit of creditors was an act of bankruptcy whether the grantor was solvent or insolvent. By section 3, subdivision 4, this is undoubtedly true. The fourth ground of bankrupty can be committed either by a solvent or insolvent debtor. Insolvency, by the statute, is not a constituent element of this ground of bankruptcy, as it is in the second and third grounds of bankruptcy. But, while insolvency is not a constituent element of all acts of bankruptcy, yet by section 3 *b*, it is an essential that the alleged bankrupt be insol-

vent at the filing of the petition. It is, therefore, proposed in this article not to dispute the proposition that insolvency is immaterial in the first, fourth and fifth grounds of bankruptcy, but to maintain that the petition can be filed only against a person who, at the time of filing such petition, is insolvent. There is no intention to criticise the learned judge; the opinion is correct so far as it goes, yet it is thought that the provision of section 3 *b*, which provides that

"A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act,"

has been overlooked.

By the act of 1867 there were eight grounds or acts of bankruptcy. In one of them, the seventh, where property was conveyed with the intent to give a preference or to otherwise defeat or delay the operation of the bankrupt law, insolvency or the contemplation of insolvency in the alleged bankrupt was a necessary or constituent element. Rev. Stat. (1873–4), sec. 5021, subsection 7; Bump on Bankruptcy (10th ed.), p. 421, and cases cited. In the other seven acts of bankruptcy it was immaterial whether the debtor was solvent or insolvent; and the courts repeatedly held that it was not an element of these acts of bankruptcy that the debtor be, at the time of committing them, solvent or insolvent, or in contemplation of bankruptcy or insolvency, nor was any allegation to that effect necessary. *In re Dunham & Orr*, 2 B. R. 17; s. c. 1, L. T. B., 89; s. c., 2 Ben. 488; *In re Randall & Sunderland*, 3 B. R. 18; s. c., 1 Deady, 557; s. c., 2 L. T. B. 69; *In re Nickodemus*, 3 B. R. 230; s. c., 1 L. T. B. 140; s. c., 2 C. L. N. 49; s. c., 16 Pitts. L. J. 233; *In re Thomas Ryan*, 2 Saw. 411; Bump on Bankruptcy (10th ed.), p. 408. Insolvency at the time of committing the act of bankruptcy was not in seven cases a constituent element; and a petition in involuntary bankruptcy could be filed against anyone committing one of these acts, whether at the time of committing such act or at the time of filing the petition the party proceeded against be solvent or insolvent. To support a petition in involuntary bankruptcy under the act of 1867, only one thing was needful—that the party proceeded against should have committed within six months an act of bankruptcy. It was not necessary that at the time of filing the petition that alleged bankrupt be insolvent. One thing alone was essential—an act of bankruptcy which might or might not require that the person committing it be insolvent.

Under the present law two things are necessary to the filing of a petition in involuntary bankruptcy: First, that the alleged bankrupt

has committed within four months previously an act of bankruptcy to which insolvency may or may not be essential; and, second, that at the time of filing the petition the person proceeded against be insolvent. Sections 3 *a* and 3 *b*. Section 3 *b* provides, "A petition may be filed against a person who *is insolvent* and who has committed an act of bankruptcy within four months from the commission of such act." Section 3 *a* provides what are these acts. In only two of them, the second and third, is insolvency made a constituent element, and the learned judge seems to be correct when he holds that, in the fourth act or ground of bankruptcy, it is immaterial whether at the time of the commission of the act the alleged bankrupt be solvent or insolvent. Insolvency is not an essential element of the first, fourth or fifth acts of bankruptcy.

But the question is, How can a petition be filed against one who is at the time of the filing perfectly solvent? By section 3 *b* insolvency, though not always a necessary element in the act of bankruptcy, is a prerequisite to the filing of the petition. This, as the statute provides, can be filed only against an insolvent. Insolvent when? Not at the time of the commission of the act of bankruptcy, for some acts do not require that the person committing them be insolvent; but insolvency at the time of filing the petition, for the statute expressly says that the petition may be filed against a person who *is* insolvent and *who has committed* within the four months previous an act of bankruptcy. A fair construction of sections 3 *a* and 3 *b* would seem to support the conclusion pointed out above—that to warrant the bankrupt court in administering the trust, the alleged bankrupt must have committed one of the five acts of bankruptcy within the four months previous to the filing of the petition, and at the time of the filing of the petition he must be insolvent. We know of no decisions to support this position; the law is a new one and must yet be interpreted by the Supreme Court.

It will be well, however, to examine the authorities cited by the court to see if they contain anything contrary to the proposed construction, and also whether they support the proposition laid down in *Lea* v. *West*, *supra*, that a general deed of assignment for the benefit of creditors is of itself sufficient to give jurisdiction to the bankrupt court whether the alleged bankrupt be solvent or insolvent. All the cases cited by the learned judge were decided under the law of 1867, which did not require that the petition be filed against an insolvent, but required only that the person proceeded against should have com-

mitted an act of bankruptcy within the six months previous to the filing of the petition. From this alone, it would seem that the cases cited are not authority under the present law, which requires insolvency at the time of the filing of the petition. But passing this objection by, we shall see that there is further objection to the cases cited. The case chiefly relied upon is *Boese* v. *King*, 108 U. S. 385, in which Mr. Justice Harlan used the following language:

"It is equally clear, we think, that an assignment by Locke of his entire property to be disposed of as prescribed by the statute of New Jersey, and, therefore, independently of the bankrupt court, constitutes itself an act of bankruptcy for which, upon the petition of a creditor within the proper time, Locke could have been adjudged a bankrupt, and the property wrested from his assignee for administration in the bankrupt court."

The court, however, held that the petitioning creditors had waited too long—more than the six months provided in the act of 1867, and dismissed the petition. The case was not decided upon the question of solvency or insolvency, but upon the point that the petition had not been brought within the prescribed time. So far as the case relates to the question of solvency it is merely a *dictum*. But, again, granting that the case states the law at that time correctly, and no one denies that it does, there was a provision in the law of 1867 very different from the present act. Any conveyance made with the intent to defeat or delay the act of 1867 was an act of bankruptcy. This is not made a ground of bankruptcy under the present law. Nowhere in the case does it appear that the question of solvency or insolvency was raised; Locke had committed an act of bankruptcy under the then existing law, and that act was sufficient to sustain a petition in involuntary bankruptcy by his creditors, if such petition was brought in the proper time. Insolvency at the time of the filing of the petition was not required by the law at that time.

Black on Bankruptcy, p. 20, cited by the court in *Lea* v. *West*, *supra*, certainly does not support the position of the court in the following language:

"In this country it is well settled upon the authorities that a general assignment made by an *insolvent* debtor (italics ours) is an act of bankruptcy, although it embraces all his property, and purports to be made for the equal benefit of all his creditors, and creates or intends to create no preferences, and is free from fraud, and although he denies any intention to evade or defeat the bankruptcy act," etc.

Surely this does not support the claim that a general deed of assignment made by a *solvent* is of itself sufficient to sustain a petition in involuntary bankruptcy.

In re Burt, 1 Dill. 439, Fed. Cases, No. 2210; *In re Smith*, Fed. Cases, No. 12974, cited by the court in *Lea* v. *West*, *supra*, to sustain its position, are cited both by Black on Bankruptcy, p. 20, and by Bump on Bankruptcy (10th ed.), p. 421, to the effect that a general deed of assignment by an *insolvent* debtor, made with the intent to defeat or delay the operation of the old bankrupt law, is an act of bankruptcy. As has been said above, such a conveyance with such an intent was, under the act of 1867, an act of bankruptcy, for which alone the person committing it could be put into involuntary bankruptcy.

The cases do not seem to support the position of the court. Let us now look to the reasoning of the decision. In *Lea* v. *West*, p. 663, the following language is used:

"And the law particularly provides, in involuntary cases for contesting the first, second and third grounds of bankruptcy by allowing the bankrupt to disprove his alleged insolvency, and the burden of proving solvency is placed on him."

This is not an exact statement of the law. The burden of proving solvency is not in all cases put upon the alleged bankrupt. Section 3 *c* places it absolutely upon him where the proceedings are instituted under the first subdivision of section 3, but where the proceedings are under the second and third subdivisions of that section, section 3 *d* places the burden of proving solvency conditionally upon the party proceeded against. It is not absolutely placed upon him. Again, the insolvency referred to in section 3 *c* must be at the filing of the petition. It is insolvency at that time, and not at the commission of the act of bankruptcy to which this section seems to refer; while the word "insolvency" in section 3 *d* would seem to refer to the insolvency at the time of the commission of the act of bankruptcy which is necessary to the completion of the second and third acts of bankruptcy. This view is strengthened by the fact that insolvency is not essential to the completion of the first act of bankruptcy, as it is to the second and third, and by the fact that insolvency in section 3 *c* is limited to the time of filing the petition while it is not so limited in section 3 *d*.

To the argument that no provision has been made for contesting the fourth and fifth acts of bankruptcy upon the grounds of solvency, it may be replied that insolvency is not necessary to the completion of these acts; that they may be committed by solvents and insolvents alike; but that insolvency at the time of filing the petition is the bone

of contention. We cannot agree that "the question of insolvency is not one open to dispute," when this view of the matter is taken. A man may be insolvent at the commission of the act of bankruptcy and by some fortuitous chance be perfectly solvent at the time of filing the petition against him. Must he have his property tied up in the bankruptcy court to please some creditor who may have a grudge, or to allow the bankrupt court to administer the trust, pay off the liabilities, and distribute the assets just to see if it has jurisdiction? This seems to be the position taken by the court. Suppose that after administering the trust, the court finds that the party proceeded against is perfectly solvent, what will be its authority for its action? The court is without jurisdiction; the law was not intended for administering the assets of a solvent person. Surely one so fortunate may pay his debts as he chooses.

Insolvency at the time of filing the petition is as essential to the jurisdiction as the commission of an act of bankruptcy within the four months previous. The statute expressly says that a petition may be filed against a person who is *insolvent and who has* committed an act of bankruptcy within four months after the commission of such act. Section 3 *b*. And it would seem that both the insolvency at that time and the commission of the act of bankruptcy within the four months previous must be alleged in the petition and proved, unless the law makes an exception in some case, as it has by section 3 *c*, where the proceedings are instituted under the first subdivision. There it would seem that both the insolvency and the act must be set out in the petition, but the burden of proving solvency is upon the party proceeded against.

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